

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GERALD A. McGUIGAN,)
Petitioner,) Civ. No. 04-1867-TC
vs.)
FINDINGS AND RECOMMENDATION
GUY HALL,)
Respondent.)

Coffin, Magistrate Judge:

Before the court is petitioner's Amended Petition for Writ of Habeas Corpus (#32). For the reasons that follow, the petition should be denied.

Background

Petitioner was indicted on five counts of first-degree sex abuse, based on allegations that he sexually touched the daughter of his girlfriend at the time, Cindy Sage. Resp. Ex. 102. The complainant, LS, was six years old at the time of trial. Tr. 65. LS had a habit of climbing into bed with Sage and petitioner, who slept in the nude. She testified that petitioner's "boy private

1 part" touched her buttocks on a number of occasions and left
2 ejaculate on her clothing. Tr. 72-73, 91-92. The jury also
3 heard witnesses testify to similar reports from LS and viewed two
4 videotapes of interviews with LS concerning those events. Tr.
5 187, 192-93.

6 The state's evidence included statements that petitioner
7 made to two police detectives. Detective Braziel testified that
8 petitioner stated that he awoke several times with his penis
9 against LS's back, and that he often awoke with pre-ejaculate on
10 his penis. Tr. 225-26. Detective Donaca testified that
11 petitioner stated that he had a "wet dream" while sleeping next
12 to LS, and when he awoke, some ejaculate was on her clothing.
13 Tr. 214.

14 Petitioner testified at trial. He stated that none of the
15 sexual touching was ever intentional. Tr. 225-26. He explained
16 that LS and her siblings would come into Sage's bed, and that he
17 usually slept in the nude. Tr. 274-316. He explained that he
18 had no sexual interest in LS, and that the ejaculate on LS's
19 clothing resulted from nocturnal emissions. Tr. 305.

20 After three-and-a-half days of deliberation, the jury
21 convicted petitioner on 4 of the five counts. The court imposed
22 consecutive sentences on counts one and two, resulting in a 150-
23 month prison term. Tr. 527.

24 The Oregon Court of Appeals affirmed the judgment without an
25 opinion. Resp. Ex. 105. Petitioner filed a petition for post-
26 conviction relief in Umatilla County Circuit Court. On one claim
27 for ineffective assistance of trial counsel, petitioner stated,
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1 "Defense counsel did not make appropriate motions and objections
2 at trial to preserve legal issues for later appeal." Resp. Ex.
3 106.

4 In deposition, respondent asked petitioner to clarify his
5 assertion that his trial counsel failed to make appropriate
6 motions. The colloquy proceeded as follows:

7
8 Respondent's Counsel: Your final claim is that your
9 attorney did not make appropriate motions and
objections at trial, and now, what specifically are
you talking about here?

10 [Petitioner discusses trial counsel's failure to
11 object to a videotape evidence.]

12 Respondent's Counsel: Okay, you mentioned that the
13 judge put something on the record about the jurors
seeing you in shackles,-

14 Petitioner: Yes.

15 Respondent's Counsel: - at what point in the trial
16 did that place, do you remember?

17 Petitioner: Yeah that was like on the - I'm going to
18 say halfway through the second day, halfway through
the second day of trial, or almost to the end of the
second day.

19 Respondent's Counsel: Okay.

20 * * *

21 Respondent's Counsel: Okay. Is there anything else
22 you wanted to say about that allegation?

23 Petitioner: Uhm, I felt that, you know, the jury
24 seeing me like that definitely set a - you know,
definitely set a bad example, like, you know, I
needed to be in shackles or whatever, but I felt - I
felt like maybe, you know, I posed a danger to people
25 or something, and I didn't.

26 Resp. Ex. 113, at 14, 17-18.

27 The trial record does not indicate that the judge noted on

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1 the record petitioner's exposure to the jury while shackled.
2 Rather, petitioner's trial counsel, James Jagger, averred that he
3 did not bring the incident to the judge's attention. In an
4 affidavit put before the post-conviction court, Jagger stated:

5
6 Mr. McGuigan advised me that he had been seen by
7 the jury while he was in handcuffs. I thought about
8 filing a Motion for Mistrial. The trial had been
9 going very well. I have been a trial attorney, both
10 prosecuting and defending criminal cases, for
11 approximately 32 years. A Defendant has a better
12 chance of success in the first trial when there is
13 still some element of surprise than in a second
14 trial. My experience is that the prosecuting
15 witnesses are better prepared for cross-examination.
16 I did not believe that the viewing of the Defendant
17 particularly aggravated and made a judgment that our
18 best chance for success was at this trial absent a
19 Motion for Mistrial.

20 Resp. Ex. 115, at 2. The exposure took place outside the court
21 proceedings, during a recess while petitioner was escorted by
22 police. Resp. Ex. 114 at 15.

23 At the post-conviction hearing, respondent briefed the
24 merits of petitioner's argument that his trial counsel was
25 inadequate for failing to object (or move for a mistrial) based
26 on petitioner's exposure to the jury while handcuffed.
27 Petitioner argued to the post-conviction court that his trial
28 counsel failed to make necessary objections. See Resp. Ex. 119.

29 The post-conviction issued a letter opinion denying
30 petitioner's claims. Resp. Ex. 119 at 7. It discussed the
31 merits of petitioner's claim concerning his trial counsel's
32 failure to take action after petitioner's exposure to the jurors,
33 Resp. Ex. 119 at 2-5, but disposed of the issue for failure to

1 plead the claim in the post-conviction petition. Resp. Ex. at 5.

2 The court instructed respondent's counsel to submit proposed
3 findings of fact and conclusions of law and subsequently adopted
4 them. The order stated, in part:

5

6 FINDINGS OF FACT

7 7. Petitioner received adequate assistance of
8 trial counsel.
9 8. Trial counsel adequately investigated
10 petitioner's case.
11 9. Petitioner admitted to his crimes.
12 Petitioner told officers that he had woken up
13 rubbing himself against [LS] on several
14 occasions.
15 10. Trial counsel chose not to hire an
16 investigator so that he could be personally
17 involved in the investigation.

18 * * * * *

19 23. Trial counsel made all appropriate motions
20 and objections.
21 24. Petitioner claimed in his deposition that
22 trial counsel should have moved to suppress
23 the videotape and object that the jury saw
24 petitioner in shackles.
25. The issue of the jury seeing petitioner in
26 shackles was not specifically plead in
27 petitioner's amended petition.
28

* * * * *

20 CONCLUSIONS OF LAW

21 1. Based on findings of fact set forth above,
22 in the underlying criminal proceedings resulting in
23 petitioner's conviction, petitioner was not denied
24 the right to assistance of counsel, as guaranteed by
25 either the United States Constitution and as
articulated by the United States Supreme court in
Strickland v. Washington, 466 U.S. 668 (1984), or
the Constitution of the State of Oregon.

26 2. As to pleading issues, because those issues
27 are not included in the petition, they are deemed
28 waived, and petitioner cannot raise them at trial.
Petitioner must "select the issues that he wants to
litigate" in a post-conviction proceeding . . .

1 Petitioner's claim regarding being shackled is
2 barred for failure to plead the issue.

3 Petitioner did not prove any of his claims
4 by a preponderance of the evidence.

5 Before the post-conviction court adopted respondent's proposed
6 findings and conclusions, petitioner moved for reconsideration.
7 Resp. Ex. 120. He stated that he had informed his post-
8 conviction attorney, Mark Mordini, of the shackling issue and
9 "expected him to brief the issue as needed." Id. at 2. He ended
10 the motion with a prayer for relief stating:

11 Respectfully, I request: 1) The Court re-open
12 the PCR on the single issue of shackling. 2) Allow
13 further briefing which will give the Oregon Court of
14 Appeals a fuller record to draw from. 3) Order
15 Counsel of Record Mark Mordini to submit an
16 affidavit outlining my prior discussions with him on
17 the shackling issue.

18 The issue cannot prejudice the State's position
19 Your Honor. In fact, it will do the opposite, by
20 conserving precious judicial resources in the event
21 the Court of Appeals remands this issue for further
22 consideration at this PCR level. This expense can
23 be avoided at this time by allowing further briefing
24 on this single issue.

25 Id. at 3. The court adopted respondent's proposed findings of
26 fact and conclusions of law and dismissed the petition. Resp.
27 Ex. 122.

28 Petitioner appealed, assigning error to the post-conviction
judge's determination that he had not pleaded as inadequate
assistance his trial counsel's failure to make an appropriate
motion after learning that petitioner had been exposed to the
jurors while shackled. Resp. Ex. 123, at 2-10. The Oregon Court

1 of Appeals affirmed the post-conviction judgment without an
2 opinion. Resp. Ex 128.

3 In this habeas corpus case, petitioner against raises the
4 claim of ineffective assistance of counsel.¹ He asserts that his
5 trial counsel failed to seek any curative remedy after learning
6 that petitioner had been exposed the jurors while shackled.
7 Respondent asserts that the issue is procedurally defaulted
8 because it was not properly raised before the post-conviction
9 court. For the reasons that follow, petitioner's claim is
10 defaulted and should be denied.

11

12 Discussion

13 Before a habeas court may address the merits of a
14 petitioner's claims, it must determine whether the petitioner
15 ensured that the relevant tribunals had the opportunity to
16 address the claim that is later articulated in the habeas
17 petition. Coleman v. Thompson, 501 U.S. 722, 730-32 (1991).
18 Otherwise, "habeas would offer state prisoners whose custody was
19 supported by independent and adequate state grounds an end run
20 around the limits of this Court's jurisdiction and a means to
21 undermine the State's interest in enforcing its laws." Id. at
22 731. When "the court to which petitioner would be required to
23 present his claims in order to meet the exhaustion requirement
24 [finds] the claims procedurally barred," the petitioner's
25 default ordinarily bars the habeas claim. Id. at 735, n.1.

26

27 ¹ Petitioner asserted two additional claims but did not brief
them. The court does not recommend relief on the untraversed claims.
28 U.S.C. § 2248.

1 Respondent asserts that petitioner's claims are procedurally
2 barred because petitioner did not fairly present his claim to the
3 post-conviction trial court. Respondent points out that, under
4 Oregon's Post-Conviction Hearing Act, the post-conviction court
5 lacked the authority to hear matters not specifically pleaded in
6 the petition. Thus, in respondent's view, the insufficient
7 specificity in petitioner's claim concerning trial counsel's
8 failure to make "appropriate motions" prohibited the PCR court
9 from considering the unpled specification concerning
10 petitioner's exposure to the jury while shackled.

11 Petitioner, on the other hand, contends that the pleading
12 defect should not constitute procedural default because the
13 respondent and trial court had actual notice of the shackling
14 issue and addressed its merits. In petitioner's view, procedural
15 default should not lie where judicial resources were directed at
16 the issue at the trial level and no party was prejudiced by the
17 unspecific pleading. Petitioner adds that, in a case that hinged
18 on petitioner's credibility, the exposure while shackled was
19 highly prejudicial. Petitioner further argues that procedural
20 default cannot apply in this case because the procedural rules
21 that guided the post-conviction trial court to dismiss the
22 shackling-based claim were not well established or regularly
23 applied.

24 In this case, respondent's arguments are well taken. A
25 federal habeas court may not review a state court's application
26 of the state procedural rule that effects a procedural default.
27 Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). The federal court
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1 may, however, determine that a state-court default does not
2 constitute procedural default, on the basis that the state
3 procedural rule resulting in the default is unclear, not well
4 established, or inconsistently applied at the time of the post-
5 conviction trial. Dugger v. Adams, 489 U.S. 401, 410, n.6
6 (1989).

7 The rule at issue in this case is Or. Rev. Stat. § 138.580:

8 The petition shall be certified by the petitioner.
9 Facts within the personal knowledge of the petitioner
10 and the authenticity of all documents and exhibits
11 included in or attached to the petition must be sworn
12 to affirmatively as true and correct. The Supreme
13 Court, by rule, may prescribe the form of the
14 certification. The petition shall identify the
15 proceedings in which petitioner was convicted and any
16 appellate proceedings thereon, give the date of entry
17 of judgment and sentence complained of and identify any
18 previous post-conviction proceedings that the
19 petitioner has undertaken to secure a post-conviction
20 remedy, whether under ORS 138.510 to 138.680 or
otherwise, and the disposition thereof. The petition
shall set forth specifically the grounds upon which
relief is claimed, and shall state clearly the relief
desired. All facts within the personal knowledge of
the petitioner shall be set forth separately from the
other allegations of fact and shall be certified as
heretofore provided in this section. Affidavits,
records or other documentary evidence supporting the
allegations of the petition shall be attached to the
petition. Argument, citations and discussion of
authorities shall be omitted from the petition but may
be submitted in a separate memorandum of law.

21 The rule sets forth a number of requirements. The petitioner is
22 required to (1) "set forth specifically the grounds upon which
23 relief is claimed"; (2) "swear to affirmatively" "[f]acts within
24 the personal knowledge of the petitioner" included in the
25 petition; and (3) set forth facts separately from the other
26 allegations.

27 Under Oregon law, a petitioner meets these requirements only
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1 by explaining specifically in the petition how relief is
2 justified with respect to each claim. Thus, in Pinnell v.
3 Palmateer, 114 P.3d 515, 530 (Or. App. 2005), rev. denied, 114
4 P.3d 515 (Or. 2006), a post-conviction petition that "vaguely
5 alleged that criminal trial counsel failed to adequately question
6 and pursue various prospective jurors for establishing bases for
7 a challenge" did not properly plead the claim that counsel was
8 inadequate for failing to question "obviously biased" jurors or
9 "exercise necessary challenges" during voir dire. Similarly, in
10 Bowen v. Johnson, 999 P.2d 1159, 1160 (Or. App. 2000), a petition
11 that asserted that petitioner was deprived of effective counsel
12 "in several ways" and which asserted that the jury instructions
13 were confusing did not suffice to plead that trial counsel was
14 ineffective for failing to challenge the instructions.

15 Here, petitioner did not set forth shackling-based grounds
16 in the petition to support his the ineffective assistance of
17 counsel claim. Rather, he stated, "Defense counsel did not make
18 appropriate motions and objections at trial to preserve legal
19 issues for appeal." Ex. 106, at 3. Under Oregon post-conviction
20 procedural law, his pleading was inadequate. There were no
21 specifically pleaded grounds, nor did petitioner state the
22 allegations concerning his shackling. Nor did petitioner swear
23 to facts within the petition concerning shackling.

24 I see no evidence that the rule has been inconsistently
25 applied, lacks clarity, or is not well established; rather the
26 searching discussions of Or. Rev. Stat. § 138.580 set forth clear
27 standards for post-conviction courts to follow.

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Petitioner's equity arguments, though well stated and sensible, cannot overcome the default. Under Oregon law, the post-conviction court is strictly limited to hearing only specifications pleaded in the petition. It has a duty to determine whether a claim is sufficiently pleaded before ruling on it, and it lacks the authority to decide other matters. Bowen, 999 P.2d at 1161. Thus, even though the post-conviction court was apprised of the basis for petitioner's claim outside the scope of the pleading, ruling on its merits would have invited reversal under Bowen.²

Conclusion

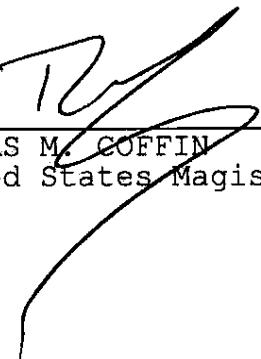
For the foregoing reasons, petitioner's Amended Petition for Writ of Habeas Corpus (#32) should be denied and the case dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district

² I add that, even if petitioner's claim were not defaulted, he would not prevail on the merits. Under Strickland v. Washington, 466 U.S. 668 (1984), petitioner must overcome the presumption that, "under the circumstances, the challenged action might be considered sound trial strategy." Here, petitioner's trial counsel evaluated the incident, determined that the exposure was not "particularly aggravated," and concluded that petitioner's "best chance of success" was to continue with the trial, which was going "very well." In his view, to move for a mistrial would introduce the possibility that prosecuting witnesses would be better prepared at a second trial, and the element of surprise would not work in petitioner's favor. "A jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom" does not warrant habeas relief absent "an affirmative showing of actual prejudice." Rhoden v. Rowland, 172 F.3d 633, 636 (9th Cir. 1999).

1 court's judgment or appealable order. The parties shall have ten
2 days from the date of service of a copy of this recommendation
3 within which to file specific written objections. Failure to
4 timely file objections to any factual determinations of the
5 Magistrate Judge will be considered a waiver of a party's right
6 to de novo consideration of the factual issue and will constitute
7 a waiver of a party's right to appellate review of the findings
8 of fact in an order or judgment entered pursuant to the
9 Magistrate Judge's recommendation.

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11 Dated this 4th day of January, 2008.

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15 THOMAS M. COFFIN
16 United States Magistrate Judge
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